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IN THE

Supreme Court of the United States

October Term, 1948.

No. ~~868~~ 122

HARRY NORMAN BALL, Trustee,
Appellant.

UNITED STATES OF AMERICA,
Plaintiff,

v.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN OPPOSITION TO MOTION TO AFFIRM.

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PARAMOUNT PICTURES, INC., et al.,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN OPPOSITION TO MOTION TO AFFIRM.

This suit was instituted by the United States under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat.

1167 (15 U. S. C. A., Section 4), to prevent and restrain violations of that Act. Following a decree of an Expediting Court convened pursuant to the provisions of the Act of April 6, 1942, 56 Stat. 198, 199 (15 U. S. C. A., Section 28), granting an injunction and other relief, this Court on appeal affirmed the judgment in part, reversed it in part, and remanded the case to the District Court for proceedings in conformity with the opinion rendered by this Court. Thereafter a consent decree as to the Paramount defendants was entered on March 3, 1949, after argument held that day. Appellants sought to intervene in the consent decree proceedings, and asked leave to file a brief therein. The District Court denied intervention, and refused to receive a brief from the appellant. This appeal followed.

OPINIONS BELOW.

The order of the District Court denying the appellant's motion to intervene and for leave to file a brief was made on March 3, 1949. No written opinion was filed.

The aforesaid opinion of the Expediting Court, filed on June 11, 1946, is reported in 66 F. Supp. 323.

The aforesaid opinion of this Court, remanding the proceedings, was filed on May 3, 1948 and is reported in 334 U. S. 131.

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JURISDICTION.

The jurisdiction of this Court is provided by Section 2 of the Act of February 11, 1903, as amended, 62 Stat. 989 (15 U. S. C. A. Section 29) and by Title 28, United States Code, Section 2101.

STATEMENT OF THE CASE.

In August 1943 appellant purchased the Penn Theatre, located in Ambridge, Pa. At the time, said theatre was leased by the Pennware Theatre Corporation, the lease expiring April 30, 1944. The capital stock of that corporation was owned one-half by one A. N. Notopoulos, a circuit theatre operator; and the other half by Atlantic States Theatre Corporation, a wholly owned subsidiary of Paramount Pictures, Inc. For at least ten years preceding the expiration of the lease, Pennware had been licensed to exhibit all of Paramount pictures first run at the Penn Theatre and one-half of RKO, Loew's and 20th Century-Fox product. While negotiations for renewal of the lease were on, Pennware was reconverting a garage property down the street into another theatre, thereafter named the State Theatre. Pennware vacated the Penn Theatre in April 1944. Appellant was thereafter unable to obtain any first run pictures from any of the distributor defendants.

Appellant thereupon instituted suit under the Sherman and Clayton Anti-Trust Acts as a result of which judgment has been entered in the District Court for the Western District of Pennsylvania pursuant to a mandate of the Court of Appeals for the Third Circuit, dated July 21, 1948, and reported in 168 F. (2d) 317, directing the entry of a decree in plaintiff's favor for injunctive relief and for damages, leaving the form of the decree and the amount of said damages for determination by the District Court. Subsequently a decree of injunction was entered by the District Court, from which this appellant has appealed to the Court of Appeals for the Third Circuit on the ground of the inadequacy of the said decree. That appeal is still pending and undetermined.

The gist of the appellant's complaint in the suit instituted by him in the District Court for the Western District of Pennsylvania, now pending on appeal in the Court of Appeals for the Third Circuit, is that the State Theatre, owned and operated by defendants in that suit, one-half of the ownership of the said theatre being vested in the Paramount defendant, was the fruit of an illegal conspiracy, and that plaintiff is therefore entitled to a provision in the injunction restricting the continued operation of the State Theatre.

Appellant learned of the proposed consent decree in the present case only through the trade papers. No official notice of any negotiations for said decree had been received by appellant from either the Paramount defendants or from the Government, although both the Paramount defendants and the Government were cognizant of the suit of appellant in the District Court of the Western District of Pennsylvania involving the State Theatre. Appellant appeared on the day set for the consideration of the consent decree by the Expediting Court and sought to intervene in the

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proceedings for consideration of the proposed consent decree, and for leave to file a brief with the Expediting Court setting forth appellant's contention.

At one point of the hearing the Judges of the Expediting Court consented to receive a brief from the appellant. Later in the oral argument, however, the Judges declined to receive any brief, refused appellant's intervention, and signed the consent decree at the conclusion of the hearing on that same day.

Intervention and the opportunity of filing a brief was sought by the appellant in this case on the ground that the State Theatre in Ambridge, Pa. (of which a one-half interest was owned by the Paramount defendants through a wholly owned subsidiary) was in fact an illegal fruit of the monopoly and conspiracy practices, had been acquired and maintained by those unlawful practices, and had been used in restraint of trade.

The consent decree, which consists of seventy-nine printed pages, is devoid of any inquiry "into the circumstances under which a particular interest has been acquired" (United States vs. Paramount Pictures, Inc., 334 U. S. 131), but has treated all theatres jointly owned by the Paramount defendants and other exhibitors in the same category. It provides that there shall be a division of the assets of Paramount into two kinds, and a division of the stockholders into two groups. The theatre assets are to be turned over to a newly formed corporation, and the other assets, presumably the motion picture producing assets, are to be turned over to another corporation to be newly created, thereby resulting in a film company, and a theatre company. The present Paramount Company is to be dissolved, and all the stock of the two corporations is to be distributed pro-rata to the stockholders of the present Paramount defendants.

The decree also provides on page 38 (III, 9(a)) that existing joint ownership in the listed theatres shall be terminated within three years by a sale to a co-owner or to a third party, and on page 48 of the decree (III, 9(c)) it is provided that if Paramount's interests in jointly owned theatres are not so sold or transferred, Paramount or the new theatre company may negotiate for the sale of the entire joint interest.

The decree further provides on page 5 thereof (II, 8) that the Paramount defendants are enjoined from "licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others." However, there is no provision for an exhibitor who knows there has been discrimination to obtain relief through any tribunal. Nor does there appear to have been any effort to determine whether or not in any given case (such as the appellant's theatre) there exists any illegal fruits of conspiracy or monopoly.

It should also be noted that the consent decree contains no provision that the executive and managing heads of the Paramount defendants (many of whom have held their positions during many years of the monopoly and restraint period and are therefore presumably the persons who ordered and directed the acts of restraint and monopoly) shall not move over with the assets to the theatre company in similar position. Presumably these persons will be divided as the stockholders and assets are divided, and will hold similar positions in both companies. In this way the proclivity for monopoly and restraint to which this Court referred in its opinion (334 U. S. 131), may well continue

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even though there is a transfer and division between the two new companies as indicated.

Appellant seeks to intervene on the additional ground that the consent decree disregarded the mandate of this Court, when the consent decree merely restrains the Paramount defendants from licensing film other than "theatre by theatre," and "without discrimination," as well as on the ground that the Court should permit appellant to prove that the State Theatre, one-half of which was owned by the Paramount defendants, had been acquired, maintained and used for monopoly practices and was an illegal fruit of the monopoly, that the appellant was directly interested in said State Theatre and in the proper disposition of the interest of the Paramount defendants therein, and that there should be included in the consent decree provisions which would effectively protect the appellant, as well as all other theatre owners similarly situated.

The net result of the consent decree was the retention by the Paramount defendants of a very large part of the fruits of the illegal conspiracy and monopoly of which they had been found guilty by this Court.

ARGUMENT.

I. The questions presented on this appeal are substantial.

The appellant has been seriously affected adversely both by the refusal of the Expediting Court to grant him leave to intervene and to file a brief and by the terms of the consent decree entered by said Court.

Argument

The test to determine whether or not questions presented on appeal to this Court are substantial (except in cases of frivolous issue) is whether such issues have already been considered and whether a further determination of such issues have been so clearly "foreclosed" by prior decisions as not to merit any further argument.

Such is not the case in this appeal, and this Court can and should consider, after full argument on the merits, the issues raised herein.

Neither the Government in its motion or Paramount in its motion cite any cases, which, when thoroughly analyzed, require the affirmance of the consent decree or the dismissal of this appeal.

Cases Cited in Government's Brief.

No cases are cited by the Government except two of the four cases which were already cited by appellant in his Statement of Jurisdiction and which the Government has attempted to distinguish.

Furthermore, the Government on page 5 of its typewritten brief states:

> "It (the government) supported the petitioner appellant's rights to be heard with respect to his claim that the consent decree might prejudice his position in the Third Circuit litigation, but denied that any such prejudice could occur and opposed his application to become a party to this litigation."

If the Government concedes that the appellant had a right to be heard, it follows that the questions presented must have been so substantial that the Government should not on this appeal be heard to say otherwise.

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Cases Cited in Paramount's Brief.

The cases cited by Paramount, when thoroughly analyzed, do not justify its motion to dismiss.

St. Louis Amusement Co. v. United States, 326 U. S. 680 (1945).

Paramount would have this Court believe that the questions raised herein are so completely foreclosed by this Court's opinion in the *St. Louis Amusement Company* case as not to warrant further consideration of this appeal; yet the full and complete decision of this Court in that case is contained in the following *per curiam* opinion:

> "October 8, 1945. *Per curiam*: The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. United States vs. California Canneries, 279 U. S. 553, 556 and cases cited; Allen Company vs. Cash Register Company, 322 U. S. 137, 142."

It should be noted that each of the two above cited cases in said *per curiam* opinion have been cited by appellant in his Jurisdictional Statement.

An examination of the record in the *St. Louis Amusement Company* case shows that the appeal was from an order of the Expediting Court entered on February 26, 1945 denying appellant leave to intervene in the United States vs. Paramount litigation. On November 20, 1940 a decree had been entered by consent against the five distributor-producer-exhibitor-defendants. Said consent decree of November 20, 1940 was to operate for a trial period of three years at the end of which time any party to the decree was authorized to apply to the Court for modification. The three year experimental or trial period provided for in that consent de-

cree expired. Trial of all the issues raised by the government's amended complaint had on motion of the Government been set for October 8, 1945.

In August of 1944 the Government had filed a petition for modification of the consent decree.

The modification proposed covered all relief sought in the Government's amended complaint. By the time this petition came on for hearing in December, 1944, it had developed that the relief sought by the Government could be obtained only after trial upon the merits. The Government accordingly abandoned its petition for modification and requested the case be set for trial on all issues raised by the amended complaint. It was at this hearing in December, 1944 that the court orally denied from the bench the appellant's application for leave to intervene, which had been filed in September, 1944. The appellants apparently had sought to free their theatres from the arbitration provisions of the consent decree. On February 26, 1945, the court entered a formal order denying leave to intervene.

It readily will be observed that the only ground for the appellants to claim a right of intervention was as members of a large class. The appellants based their right solely on the ground that "representation of their interest by the existing parties has been and will continue to be inadequate, that they are bound by the existing decree and will be bound by the proposed modified decree, that their claims and the main action have questions of law and fact in common, and that their application is timely."

In its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" the Government said:

> "Petitioner appellant's experience under the consent decree and any legal argument advanced by them as to the legality of arbitration provisions might be appropriately considered by the District Court if pre-

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sented to it in an amicus brief. The government and the District Court invited the filing of such a brief."

Contrast this with the situation in the case at bar, in which the Expediting Court, after having earlier in the day agreed to accept a brief from the appellant, later in that same hearing categorically denied to the appellant even the right to file a brief, let alone the right to intervene.

In the Statement Opposing Jurisdiction filed by the Paramount defendants in the *St. Louis Amusement Co.* case, the Paramount defendants point out that an order denying leave to intervene is not appealable "at least unless the applicant for intervention has a direct and immediate interest in a res which is the subject of the suit and which will be lost if intervention is denied."

This is precisely the situation in the present case, as contrasted with the situation of the appellant in the *St. Louis Amusement Co.* case. In the *St. Louis Amusement Co.* case, there was no specific res in which the appellant could claim any direct interest. In the present case, the appellant claims a direct and immediate interest in a res which is directly dealt with in the consent decree of the Expediting Court, to wit, the State Theatre in Ambridge, Pa.

Jewel Incandescent Lamp Co., Inc. v. General Electric Co., 318 U. S. 746 (1943).

The full and complete opinion of your Honorable Court in that case (like the *St. Louis Amusement Company* case) is contained in a brief *per curiam* opinion as follows:

"April 19, 1943. The appeal is dismissed on the authority of Exparte Cutting, 94 U. S. 14, Credits Commutation Co. v. United States, 177 U. S. 311, and

United States v. California Cooperative Canneries, 279 U. S. 553, 556."

It appears from the record that the Jewel Incandescent Lamp Co. made an application to intervene in an anti-trust suit, by proposing to file a complaint in a suit instituted by the Government against General Electric Co., Westinghouse Electric Co. and others, by adding to said suit averments of subsequent conspiracy by the defendants along the lines of restraint, and asking in addition to the relief prayed for by the Government, that General Electric and Westinghouse Electric be directed to restore price levels for lamps up to the level at which they had been before the price reductions had been made by these companies about which the Jewel Incandescent Lamp Co. complained. The Government indicated it did not oppose the order of intervention.

Trial of the case had been deferred at the request of the War and Navy Department on the ground that participation in the litigation would deflect them from important war work.

The District Court for the District of New Jersey in denying the application to intervene and for an injunction increasing the price of the lamps, pointed out in its opinion (a copy of which is attached to the "Statement as to Jurisdiction" in said case at page 12 thereof), that to grant the application of the intervener to intervene, and to enter the injunction, would require the public to pay 3c each for the millions of lamps sold every month, the Court concluding:

"to grant it (intervention and injunction) would be to expose the consumer public to a hazard against which there can be no foreseeable indemnity."

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Accordingly the application to intervene was denied and the motion for an injunction, according to the District Court, "will likewise fail."

No such question is involved in the present case.

United States v. California Cooperative Canneries, 279 U. S. 553 (1929).

This case was cited in both the *St. Louis Amusement Company* case and the *Jewel Incandescent Lamp Co.* case.

The *California Cooperative Canneries* case went solely on the fact that under the Expediting Act appeals go direct to this Court, and not to a Court of Appeals of any circuit, and that this same limitation applies to the Expediting Court set up in the Supreme Court of the District of Columbia.

That case was on certiorari to review an order of the Court of Appeals of the District of Columbia refusing to set aside its earlier one which had reversed an order of the Supreme Court of the District denying a petition to intervene in a suit under the anti-trust act. Suit had been brought in the Supreme Court of the District against various packers for monopoly. A consent decree was entered. Five years later two defendants, Swift and Armour, filed motions to vacate the decree. The District Court denied these motions, appeals were taken to Court of Appeals for the district, which Court certified the record to this Court, which in turn held that the Court of Appeals was without jurisdiction. Long after the entry of the decree, the California Cooperative Canneries on its motion was allowed to intervene on the ground that the consent decree interfered with the performance by Armour of a contract made with it by which Armour agreed to buy large quantities of California canned fruit. The Supreme Court of the District denied leave to intervene, and the canneries appealed to

the Court of Appeals, which reversed the order of the District Supreme Court, and directed that leave to intervene be granted and that such further proceedings be had as were necessary to determine the issue raised. The Government moved in Court of Appeals that its judgment be vacated, but the Court of Appeals refused. Certiorari was then granted.

This Court in its opinion pointed out that Congress by the Expediting Act wanted speedy disposition of suits under anti-trust laws, and that delays before the Expediting Act were usual. There was an appeal possibility within six months to Circuit Court, then a further appeal to the Supreme Court within one year, and also the possibility of an appeal to the Circuit Court on an interlocutory injunction. The Expediting Act changed all this so that an appeal was directed to this Court from a final decree. Congress also limited the right of review to appeal from a final decree which disposed of all matters, and precluded the possibility of appeal to any Court from an interlocutory decree. The time for appeal was also shortened to sixty days. In the cited case, this Court therefore held that an appeal lies directly from the Supreme Court of the District of Columbia to this Court, without going to the Circuit Court of Appeals.

It will thus be seen that the sole point in the *California Cooperative Canneries* case was the direct nature of the appeal from the Expediting Court to the Supreme Court. No such question is involved in the present case.

Credit Commutation Company v. United States, 177 U. S. 311 (1900).

This case was also cited both in the *St. Louis Amusement Co.* case and in the *Jewel Incandescent Lamp Co.* case. It concerned a bill filed in equity against the Union Pacific

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Railway and a number of affiliated companies, for appointment of receiver, enforcement of liens and administration of property. Receivers were appointed. Thereafter the trustees of a first mortgage filed a complaint to foreclose.

The Government had filed a complaint in other proceedings against the railway company and its receivers to secure a decree of foreclosure of the subsidy lien of the government on property of the railway company. Credits Commutation Company, a corporation of Iowa filed a petition in each of the cases for leave to intervene. Combination Bridge Co., another corporation of Iowa also filed petition for leave to intervene for the same reason. These motions were denied, an appeal was filed, and a motion to dismiss or affirm was made.

The intervenors were owners of bridges and also of certain railroads connected with the Union Pacific Railway Co. The basis of their ground for intervention was to protect their right to connect with the railway and to "protect the rights of the public in such railroad connections."

This Court pointed out that "what was sought in the petitions was leave to intervene in a pending and undetermined cause and that right alone was determined" and adopted as its own the following statement of the Circuit Court of Appeals:

> "It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in Court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. *In such cases an order denying leave to intervene is not discretionary with the*

> *chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief.* The cases at Bar, however, are not of that character." (Emphasis supplied.)

In the present case, the appellant has a direct and immediate interest in a *res*, namely, the State Theatre in Ambridge, Pennsylvania, a *res* which was dealt with directly by the Expediting Court in its consent decree.

> *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137 (1944).

In this case, which was cited in the *St. Louis Amusement Company* case, your Honorable Court stated that the challenged order (the one denying intervention) was "but an order in the cause and not the final judgment," pointing out that if National's petition had ultimately been dismissed a review of the Court's denial of intervention by Allen Company would have been an idle gesture.

It also appears that the Government consented to the proposed intervention, although National opposed it; that the District Judge granted intervention conditionally, allowed counsel to make an opening statement and to take some part in the proceedings, and before making his ruling the Judge advised (in answer to his inquiry) that the president of the appellant would be called as a witness by the government. This Court on page 141 of its opinion said:

> "It is common knowledge that where a suit is of large public interest the members of the public often desire to present their views to the Court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and

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> arguments without assisting the Court. The record here discloses that the parties produced all data they and the Court thought was available upon the issues in the case. Moreover, the Court invited the government to call the appellant's president to testify as to his knowledge concerning the issues."

It is, therefore, apparent that the sole point made by this Court in citing this case in the *St. Louis Amusement Company* decision was to show that the order denying intervention in that case was "but an order in the cause and not the final judgment."

Contrast this with the instant case, in which the consent decree was entered by the Court the same day it was heard. The present appeal is from the entry of the consent decree. There can be no doubt that it is a final order, and hence appealable.

Ex parte Cutting, 94 U. S. 14 (1876).

This case, which was cited by your Honorable Court in the *Jewel Incandescent Lamp Co.* case, holds that an appeal does not lie from the refusal of leave to intervene, "for that was only a motion in the cause and not an independent suit in equity appealable here."

The appellant herein is appealing not from "a motion in the cause" but from a final decree appealable under Section 2 of the Expediting Act (United States Code, Title 15, Section 29; and Title 28, United States Code, Section 2101).

Finally, neither of the appellees have seen fit to call this Court's attention to its language in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), a prior decision in this very case, in which intervention is discussed. It will be recalled that certain associations of exhibitors, and a

number of independent exhibitors, were denied leave to intervene in the District Court. They appealed from those orders, and also filed original motions for leave to intervene in this Court. This Court postponed consideration of the original motions and of the question of its jurisdiction to hear the appeals until a hearing on the merits of the case, saying on page 177:

> "The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these anti-trust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. United States v. St. Louis Terminal, 236 U. S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the anti-trust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency proposed the idea of competitive bidding in the District Court.
>
> "We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed. *Now that the provisions for competitive bidding have been eliminated from the*

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> *decree, there is no basis for saying that the decree affects their legal rights.* Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared." (Emphasis supplied.)

It will be observed that this Court very carefully refrained from condemning the right of the petitioning intervenors, and restricted its decision solely on the ground that, since the provisions for competitive bidding having been eliminated, no further justification for intervention existed. The sole ground on intervention sought was the intervenors' attack on the competitive bidding provisions of the Expediting Court's Decree, which this Court reversed.

Thus, it is quite obvious from an examination of this Court's above quoted latest word on the subject, that the question of intervention in this particular case is substantial and one which merits full and complete argument on the merits.

II. The consent decree is wholly inadequate in failing to take into consideration situations in which the Paramount defendants own interest in theatres which they created and maintained and which represent illegal fruits of their monopoly and conspiracy.

This Court dealt at length with the question of "reward from the conspiracy through retention of its fruits" in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

Under the sub-division *"Third. Monopoly, Expansion of Theatre Holdings, Divestiture"* and citing the contemporary

opinions in *United States v. Griffith*, and *Schine Chain Theatres, Inc. v. United States*, this Court said on page 171:

> "* * * the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved * * *.
>
> " * * * For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true, but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy and theatre ownership by the five majors.
>
> "The findings of the District Court are deficient on that score and obscure on another."

Similarly the dissenting opinion by Mr. Justice Frankfurter reads on page 179:

> "This Court has both the authority and duty to consider whether a decree is well calculated to undue, as far as is possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition."

Despite these plain admonitions, no effort is made in the consent decree under consideration to determine whether or not in any case such as the appellant's theatre, there exist illegal fruits of a conspiracy or monopoly.

All of the theatres in which Paramount owns interests together with co-owners are generally treated alike, with-

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out any findings on whether the origin of the Paramount interests in such theatres are innocent or conspiratorial.

Of particular interest in this connection is the bland, statement, almost a confession, by the Paramount appellees in their "Statement Opposing Jurisdiction, etc." (page 6), as follows:

> "The judgment" (of the Expediting Court under the consent decree) "as it stands, *permits* Paramount to do so" (that is, to own a fifty (50%) percent interest in Pennware Theatre Corporation, which operates the State Theatre) "for a maximum of three years, at the end of which period it must dispose of its interest in the State Theatre." (Emphasis supplied.)

This is precisely the point which we make. It is the crux of the appellant's case. It indicates in the minds of the Paramount appellees a firm conviction that as a result of the consent decree Paramount now has a legal vested right for three (3) years to continue to operate the State Theatre, a theatre created and maintained for many years as an illegal fruit of an invalid conspiracy, condemned as such by the Court of Appeals in a final decision unappealed from, the very thing which has bled the appellant white and which threatens to put him out of the business. The Expediting Court's consent decree has, and Paramount appellees so state with boldness and assurance, achieved a result of permitting the Paramount appellees to enjoy this illegal fruit for a further period of three (3) years.

This Court in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 171 (1948), said apropos the point as follows:

> "In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sher-

man Act. But as we noted in *United States v. Griffith*, *ante*, p. 100, and see *Schine Chain Theatres, Inc., v. United States*, *ante*, p. 110, even *such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved.* As we have discussed in *Schine Chain Theatres, Inc. v. United States*, *ante*, p. 110, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution." (Emphasis supplied.)

See also *United States v. Crescent Amusement Co.*, 323 U. S. 173, 186 (1944), and in *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110, 128 (1948).

These decisions recognize the damage done to competitors by past unlawful practices as well as the continuation of pressure on competitors by Paramount which may spell the elimination of those competitors unless there is an effective stoppage. We feel this Court remanded the case to the Expediting Court for the purpose of fashioning a decree which would prevent the preservation intact of illegally created "empires," would undo past violations as well as stop their recurrence. The consent decree falls far short of that in many particulars. For instance, it gives Paramount the right for a year to show its own product exclusively in its own theatres. During that year much mis-

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chief can be done by excluding an independent from this important product. During that year an independent may be eliminated, and his economic death accomplished. Under the consent decree, Paramount could acquire Pennware's interest in the State Theatre and, owning it in toto, insofar as the consent decree is concerned, could be enabled to exclude the appellant from any of its product.

Under the particular facts and circumstances of this case, the appellant is in the position of one who seeks to intervene not as a matter of discretion, but as a matter of right, who has a direct and immediate interest in the *res* before the Court, and whose interest has been directly affected by the decree of that Court.

The Government in its motion (typewritten page 4) says that to have permitted the "exhibitors injured by Paramount to interject themselves into the proceedings for the purpose of acquiring relief specifically designed to protect their individual interests might have prevented this or any other decree by consent."

This is obviously a non-sequitur. All that the appellant in this case wanted done for his specific relief was for the Expediting Court either to omit a reference altogether to the State Theatre, or to make specific provision for the State Theatre in the light of the particular circumstances surrounding it. Instead of doing either of these things, the consent decree sees fit to include the State Theatre generally in a provision of the decree which fails to take into consideration the peculiar circumstances surrounding the State Theatre, and the appellant's rights in it, rights accorded by the decision of a Court of Appeals.

III. The consent decree fails to comply with the mandate of this Court.

Appellant urges that this Court, in examining a decree of an Expediting Court entered subsequent to a mandate from this Court, is not limited merely to errors assigned by the appellant, but has jurisdiction on its own motion to consider whether its mandate has been complied with. Robertson and Kirkham, "Jurisdiction of the Supreme Court of United States," page 269.

Thus this Court, in *Continental Insurance Co. v. United States*, 259 U. S. 156 (1922), in considering a decree involving a plan for dissolving an unlawful combination, said on page 165:

> "The appeals which brought this case here were taken under the Act of Congress approved February 11, 1903, c. 544, 32 Stat. 823, as modified by §291 of the Judicial Code. Ordinarily the scope of our review of the decree of the District Court would be limited to the assignments of error of the appellants, *but in this case, as the decree which is before us was entered under a mandate of this Court, we have jurisdiction to consider on our own motion whether our mandate has been complied with.* We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion." (Emphasis supplied.)

The provisions with respect to the State Theatre of Ambridge, Pa., as they appear in the consent decree have been heretofore set forth.

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Compare the consent decree with the following portion of the opinion of this Court in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

"It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

"We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful practices which the defendants have inflicted on the industry. To the extent that *these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. United States v. Crescent Amusement Co.*, supra, p. 189; *Schine Chain Theatres, Inc. v. United States, ante*, p. 110. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United States v. Crescent Amusement Co.*, supra, pp. 189-190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

"Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-

defendants have inflicted on the industry" (pp. 152-153).

Obviously a comparison of this Court's opinion with the consent decree provisions indicates that the consent decree fails to comply with the above quoted mandate of this Court.

On this point, the Government's motion to affirm (typewritten motion, page 4) says that "to have permitted the exhibitors injured by Paramount to interject themselves into the proceedings for the purpose of acquiring relief specifically designed to protect their individual interests might have prevented this or any other decree by consent." This shows a complete misapprehension of the situation. This is not a case where an anti-trust suit is instituted by the government, and proceeds to a consent decree. Here is bitterly contested litigation, extending over many years, ending in a mandate from this Court specifically blueprinting the nature of the required relief. Yet the consent decree entered pursuant to that mandate overlooks the specific instructions given by this Court in its mandate. Appellant is in a class of exhibitors whose interests have been specifically safe-guarded in the mandate of this Court, and whose interests therefore require specific treatment, according to the mandate of this Court.

A similar misapprehension appears elsewhere in the Government's motion (typewritten motion, page 5) in which the Government seeks to justify the decree as an exercise of judgment called for in the prosecution of a "civil procedure under the antitrust laws." This particular case goes far beyond the normal discretionary bargaining situation of a consent decree following closely upon the institution of an anti-trust suit. The ordinary area of discretion normally left to the Government in bargaining for a consent decree

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is considerably restricted by the fact that this Court in its mandate outlined the specific relief which should be granted.

There is another respect in which the consent decree utterly fails to comply with the mandate of this Court, namely the matter of bidding for motion picture product. One of the chief reasons for the reversal by this Court of the decree of the Expediting Court, was the question of competitive bidding. The District Court in its decree bottomed the entire relief on the theory of competitive bidding. Just as definitely this Court in its mandate pointed out the fallacy underlying the idea of competitive bidding, and remanded the case for relief which would eliminate the concept of competitive bidding as being in any way adequate. Yet the present consent decree, in a rather vague and nebulous sentence dealing with award of product "theatre by theatre, without discrimination," permits the distributor to revert back to the very type of relief which this Court castigated as being wholly inadequate in its mandate.

A moment's reflection will indicate the total inadequacy of this provision. Who is to be the judge of whether or not discrimination exists, or of compliance with the decree generally on this point? Under the consent decree, the Paramount defendants as producer-distributors appear entitled to make a decision as to where their product shall be sold and exhibited. No provision in the decree grants recourse to any tribunal. While an exhibitor may definitely know there is discrimination, and that the distributors have failed to sell "theatre by theatre," nonetheless by the time the exhibitor can assert his rights, time has elapsed, and as a practical matter the unfavored exhibitor is bled white and perhaps driven from business. Under the decree, only the Government has a legal right to complain. Before the aggrieved exhibitor could get the Government to act, and before the matter could be aired in Court, and considering

the opportunities for delay and other dilatory tactics which are available to the Paramount defendants, who have great resources at their disposal, and with the knowledge and proclivities with which they have been stamped judicially, the aggrieved exhibitor would probably be out of business. One need only recall the length of time that the present case has taken in the courts to realize that any such complaint by an unfavored exhibitor would not be finally adjudicated except after the lapse of a number of years.

Certainly this is not the kind of relief which this Court prescribes in its mandate. Relief under this consent decree is illusory, and would be entirely "too little and too late."

Conclusion.

This proceeding should not be blocked at its very threshold without complete inquiry and full argument on the merits. The questions presented are substantial. The consent decree is inadequate so far as concerns "the comprehensive public interest" and the appellant's interests in Ambridge, and in general fails to comply with the outstanding mandate of this Court.

It is, therefore, submitted that the Motion to Dismiss filed by the Paramount appellees and the Motion to Affirm filed by the Government should be dismissed.

Respectfully submitted,

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